POST-CONVICTION PROCEEDINGS IN CAPITAL CASES IN ARIZONA

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Right to Post-Conviction Counsel

- Counsel's appointment required by AZ Crim. Rule 32.4(c)
- Counsel must be guided by the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases – AZ Crim. Rule 6.8
- U.S. Supreme Court considering right to effective PCR counsel under U.S. Constitution – ***Martinez v. Ryan*** (revisiting ***Murray v. Giarratano***)

CLAIMS FREQUENTLY RAISED

- Ineffective Assistance of Counsel
- Newly Discovered Evidence
- Actual Innocence of Crime or Death Penalty
- Prosecution Failure to Disclose Evidence *(Brady)*
- Knowing Use of False Testimony *(Giglio)*
- Prosecutorial Misconduct
- Retroactive Application of Constitutional Right/Significant Change in the Law
- Incompetence to be Executed

PCR Counsel's Duties under ABA Guidelines:

- Raise "all issues … that are arguably meritorious under the standards applicable to high quality capital defense representation …" Guideline 10.15.1(C)
- "[C]ontinually monitor the client's mental, physical and emotional condition …" Guideline 10.15.1(E)(2)
- "Continue an aggressive investigation of all aspects of the case." Guideline 10.15.1(E)(4)

Ineffective Assistance

Defendant must establish two prongs:

***Deficient Performance, and**

***Actual Prejudice**

***Strickland v. Washington*, 466 U.S. 668 (1984)**

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Ineffective Assistance

Strickland Test:

Prong #1: DEFICIENT PERFORMANCE

***Representation fell below objective standard of reasonableness under prevailing professional norms.**

***Counsel's representation must be guided by the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases – AZ Crim. Rule 6.8**

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"Deficient Performance" Prong

Presumption/burdens when assessing performance prong:

***Defendant has the burden of establishing deficient performance.**

***Court must indulge strong presumption that trial counsel's actions fell within wide range of professional competent assistance.**

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Ineffective Assistance

Strickland Test:

Prong #2: **PREJUDICE**

- **Counsel's errors deprived defendant of a fair guilt/innocence or penalty trial as measured by: "[B]ut for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."** ***Strickland*****, 466 U.S. at 694.**
- **A reasonable probability standard is less than a preponderance of the evidence standard.** ***Id.***

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Ineffective Assistance

- **IAC claim waives attorney-client privilege.** ***Petersen v. Palmateer, 19 P.3d 364 (Or. App. 2001); Lawson v. State, 492 P.2d 1113 (Ok. Cr. 1971); 42 Pa. C.S. § 9573 (Pa. 2005)***
- ***Extent of waiver limited to claim raised***
- ***Court may be required to conduct in camera inspection of attorney's files to determine what documents and information are subject to waiver.***

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Failure to Investigate

Defense counsel has a duty to conduct a reasonable investigation, including mitigating evidence for penalty phase.

Counsel's duty is to either:

- **Make reasonable investigations; or**
- **Make a reasonable decision to limit or terminate a particular investigation *Wiggins v. Smith, 539 U.S. 510 (2003)***

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Failure to Investigate

- **"The defense team must conduct an ongoing, exhaustive and independent investigation of every aspect of the client's character, history, record and any circumstances of the offense, or other factors, which may provide a basis for a sentence less than death." ABA Supplementary Guidelines for the Mitigation Function, Guideline 10.11(B)**
- **Reasonable limitations may depend on nature and amount of information resulting from investigative efforts, including information provided by defendant and his family. *Comm. v. Malloy*, 856 A.2d 767 (Pa. 2000)**

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Failure to Investigate

- **The question to ask: Was counsel's action or inaction the result of:**
  - **A reasoned and informed decision; or**
  - **Merely the result the result of a failure to investigate?**
- **If counsel conducted a reasonable investigation, subsequent decisions are "virtually unchallengeable." *Strickland*.**

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Failure to Investigate

Reasonableness of investigation

- ***Rompilla v. Beard,* 545 U.S. 374 (2005)**
- **Defense counsel knew state intended to introduce evidence of prior conviction, including transcripts of witness' testimony.**
- **State needed evidence to establish aggravator.**
- **File was public record, easily accessible.**

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Failure to Investigate

Actual Prejudice:

Not from review of victim's testimony, but other evidence which would have been found in same file:

- **Prison records evidencing childhood problems and mental health mitigation**
- **Red flags alerting defense it should obtain client's medical & school records and interview witnesses**

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Failure to Investigate

Lessons from *Rompilla:*

- **Attorney has duty to obtain school, medical & prison records**
- **Attorney must review records to determine usefulness in penalty phase**
- **Simply asking defendant and family about prior felony insufficient**
- **Lack of cooperation insufficient reason to limit or terminate investigation**

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Ineffective Assistance: Defendant's Actions

The uncooperative defendant:

- **Defendant's fatalistic attitude or uncooperative attitude does not relieve counsel of duty to reasonably investigate. *Porter v. McCollum*, 130 S. Ct. 447 (2009)**
- **However, if defendant insists counsel not pursue certain investigations, counsel's decision to honor client's adamant directive generally held reasonable.**
- ***Schriro v. Landrigan*, 550 U.S. 465 (2007)(upheld waiver)**

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Failure to Present Evidence

Factors for court to consider in assessing both the performance and prejudice prongs:

1. **The nature and scope of investigation conducted before the decision was made not to present evidence.**
2. **Attorney's reasons for not presenting evidence, including tactical considerations.**

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Failure to Present Evidence

- **Failure to introduce additional mitigation**
- ***Wong v. Belmontes*, 130 S.Ct. 383 (2009), found no reasonable probability that outcome of penalty phase would have been different where additional mitigating evidence of defendant's childhood trauma would have been cumulative, evidence of defendant's non-violent character would have opened the door to evidence that he committed a prior, brutal murder, and aggravating evidence was overwhelming.**

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Failure to Present Evidence (con.)

- Failure to introduce additional mitigation (con.)
- *Porter v. McCollum*, 130 S.Ct. 447 (2009), found additional mitigating evidence of defendant's childhood trauma, military service and PTSD was not cumulative and could have effected the outcome of the penalty phase, despite the existence of four aggravating factors.

Strategic Decisions

Defendant has the ultimate authority to decide:

1. To plead guilty or not guilty;
2. To waive right to jury trial;
3. To testify or not to testify at trial; and
4. To appeal.

Florida v. Nixon, 543 U.S. 175 (2004);
Flynn v. State, 136 P.3d 909 (Kan. 2006);
Cooke v. State, 977 A.2d 803 (Del. 2009)

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Strategic Decisions

Most other decisions are vested in the professional judgment of counsel.

- **Obligation to discuss with defendant: yes**
- **Obligation to obtain consent of defendant: no**
- **Disagreement over strategy: Mere lack of agreement vs. irreconcilable conflict. *Morris v. Slappy*, 461 U.S. 1 (1983); *In Re Stenson*, 16 P.3d 1 (Wash. 2001).**

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Strategic Decisions

- An evidentiary hearing will often be required to determine if decision was in fact "strategic."
- Court must determine whether attorney has a reasonable basis for the decision made.
- Attorney's inability to provide any strategic reason may, under proper circumstances, compel a finding of deficient performance. E.g., ***State v. Barrett***, 371 Ark. 91, 263 S.W. 3d 542 (Ark. 2007); ***Ingle v. State***, 560 S.E. 2d 401 (S.C. 2002).

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Ineffective Assistance of Counsel

Per Se Denial of Assistance of Counsel

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Ineffective Assistance of Counsel: Per Se Denial of Assistance

- Rare circumstances which result in actual or constructive denial of assistance of counsel.
- Prejudice under ***Strickland*** need not be shown; prejudice is presumed
- Actions which make the adversary process presumptively unreliable. ***United States v. Cronic***, 466 U.S. 648 (1984)

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Per Se Denial of Assistance

Three Categories of Per Se Denial of Assistance of Counsel:

1. **Entire Failure to subject Case to Meaningful Adversarial Testing**
2. **Actual Denial of Counsel Through State Action**
3. **Conflict of Interest**

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Failure to Subject Case to Meaningful Adversarial Testing

- **Practical Pointer:**

  If defense counsel intends to concede guilt to 1st degree murder in opening, you should colloquy defendant or, at the least, ensure record reflects defense counsel communicated strategy to her client.

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Per Se Denial: State Action

Examples of Denial of Counsel Through State Action:

- **Appointment of new counsel one day before the beginning of capital trial.**
- **Denial of right to consult with counsel or denial of counsel at critical stage.**
- **Denial of interpreter during trial to non-English speaking defendant.**

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Other Grounds Frequently Raised

- Newly-Discovered Evidence
- Failure of Prosecution to Disclose Evidence (Brady)
- Knowing Use of False Testimony (*Giglio*)

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Other Grounds Frequently Raised

Importance of categorizing whether evidence is Newly-Discovered, *Brady, Giglio*, or Recanted Testimony:

* Determines elements defendant must establish; and
* Determines standard by which court must measure claim

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Newly Discovered Evidence

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Newly-Discovered Evidence

Defendant must show evidence:

1. **Was unknown to defendant, his attorney, and court at time of trial;**
2. **Could not have been discovered by due diligence; and**
3. **Is of such a nature that it would probably produce a different result.**

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Newly-Discovered Evidence

- **Some jurisdictions require, in addition, that defendant establish:**
  1. **The evidence is material;**
  2. **The evidence is not cumulative;**
  3. **The evidence is "impeachment evidence [that] substantially undermines testimony which was of critical significance at trial such that the evidence probably would have changed the verdict or sentence." R.32.1(e)(3)**

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Failure of State to Disclose Evidence: *Brady*

***Brady* elements:**

1. **Evidence "favorable" to the accused (either exculpatory or impeaching);**
2. **Evidence was suppressed by the prosecution (either willfully or inadvertently);**
3. **Had the evidence been disclosed, there is a reasonable probability that the result of the proceeding would have been different.**

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Failure of State to Disclose Evidence: *Brady*

- ***Brady*** **is a discrete type of newly discovered evidence**
- **But because *Brady* evidence is in prosecution's possession and was suppressed or withheld from defendant:**
  - **Lower burden is imposed; and**
  - **Due diligence need not be shown by defendant**

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Failure of State to Disclose Evidence: *Brady*

- ***Brady*** **imposes duty on prosecutor to learn of any favorable evidence in possession of <u>others acting on the state's behalf</u>, including police or agents of police.**
- **Question is whether prosecution knew or reasonably should have known of this evidence. *Kyles v. Whitley, 514 U.S. 419 (1995); Riley v. State*, 531 S.E. 2d 138 (Ga. App. 2000); *State v, Sanders*, 750 N.E. 2d 90 (Ohio 2001).**

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Failure of State to Disclose Evidence: *Brady*

Brady violation may occur even if:

* **Prosecution's action was inadvertent;**
* **Evidence is merely impeaching;**
* **Evidence is itself inadmissible (but leads to admissible evidence);**
* **Evidence is material only to punishment;**
* **Evidence in possession of police or other governmental agency.**

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Failure of State to Disclose Evidence: *Brady*

In assessing *Brady's* "prejudice" prong ("material"), court should consider how suppressed information:

- Deprived defendant of admissible evidence;
- Affected ability to investigate and prepare case;
- Affected ability to contest or present other evidence at trial.

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Knowing Use of False Testimony: Giglio

Giglio elements-

Defendant must show:

1. Witness gave false testimony;
2. Prosecutor knew the testimony was false; and
3. There is a reasonable likelihood that is could have affected the jury's verdict. *Giglio v. United States,* 405 U.S. 150 (1972).

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Knowing Use of False Testimony: Giglio

* *Giglio* violation also occurs where:

  Prosecutor discovers (after the fact) that the testimony is false and fails to correct it.

* *Napue v. Illinois*, 360 U.S. 264 (1959); *Higgins v. State*, 230 S.W. 3d 316 (Ark. App. 2006); *Howell v. State*, 295 S.E. 2d 329 (Ga. App. 1982).

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Knowing Use of False Testimony: Giglio

Knowledge of this evidence can be imputed to the prosecutor where such knowledge is possessed by anyone on the "prosecution team," which included both investigative and prosecutorial personnel. *Giglio; Ex parte Castellano,* 863 S.W.2d 476 (Tex. Cr. App. 1993).

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Knowing Use of False Testimony: Giglio

- **If defendant shows prosecutor knowingly presented false testimony, burden shifts to State.**
- **State must show error was harmless beyond a reasonable doubt.**
- ***United States v. Bagley*, 473 U.S. 667 (1985); *State v. Jimerson*, 652 N.E. 2d 278 (Ill. 1995); *Guzman v. State*, 868 So. 2d. 498 (Fla. 2004).**

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Brady, Giglio & Newly-Discovered

- ***Brady, Giglio*, and Newly Discovered evidence claims can be raised as to guilt phase or penalty phase.**
- ***E.g., Riechmann v. State*, 777 So. 2d 342 (Fla. 2000) (statements of witnesses establishing defendant and victim had a loving relationship were "material" to penalty phase; suppression violated due process, requiring new penalty phase).**
- ***Penry v. Lynaugh*, 492 U.S. 302, 328 (1989) (decision whether to impose death is not a conclusion dictated by logic, but a "reasoned moral response")**

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Brady, Giglio & Newly-Discovered

- **Individual & Cumulative Analysis Required**
- **Court must consider each claim individually to determine if they have been established.**
- **Court must then consider all established claims collectively to determine whether cumulatively they establish the necessary prejudice to entitle defendant to relief.**

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Recantation Testimony

- **Courts generally treat recantation testimony with suspicion. *State v. Porter*, 239 S.E. 2d 641 (S.C. 1977) *State v. Lewis*, 77 P.3d 1288 (Kan. App. 2003); *Blankenship v. State*, 447 A.2d 428 (Del. 1982).**
- **New trial required only if court is satisfied:**
  - **the recantation is true (i.e., the original testimony was false); and**
  - **the witness's testimony has changed to such an extent as to render probable a different result.**

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Recantation Testimony

- **Resist temptation to issue ruling on a claim of recantation without an evidentiary hearing.**
- **Where credibility of witnesses is at issue, court will generally need to hold evidentiary hearing to make this determination. *Lindhorst v. U.S.*, 585 F.2d 361 (8th Cir. 1978); *Hardiman v. State*, 789 So.2d 814 (Miss. App. 2001).**

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Frequently Raised Grounds: Intellectual Disabilities

- **Intellectual Disabilities (formerly mental retardation)**
  - * ***Atkins v. Virginia*, 536 U.S. 304 (2002)(prohibits execution of intellectual disabled defendants).**
  - * **The Court looked to the AAMR (now AAIDD) and DSM-IV-TR for the definition of mental retardation**
  - * **Mental illness not synonymous with mental retardation.**

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Retroactivity: Intellectual Disabilities

Claim of intellectually disabled defendant:

- * **Rule announced in *Atkins v. Virginia, 536 U.S. 304 (2002) is retroactively applicable to cases on collateral review as it violates the 8th Amendment to execute an intellectually disabled person. U.S. v. Holladay*, 331 F.3d 1169 (11th Cir. 2003); *In re Morris*, 328 F.3d 739 (5th Cir. 2003); *Hill v. Anderson*, 300 F. 3d 679 (6th Cir. 2002)**

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Retroactivity: Murder Committed by Juvenile

Murders committed by juveniles:

- **The execution of individuals who were under 18 years of age at the time of their capital crime is prohibited by the Eight Amendment. *Roper v. Simmons*, 543 U.S. 551 (2005).**
- **Claim may be raised on collateral review, even if otherwise time barred as it violates the 8th Amendment to execute a person who was a juvenile at the time of the offense.**

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Retroactivity: Crawford v. Washington

- USSC has held that *Crawford* does not apply retroactively.
- *Whorton v. Bockting,* 549 U.S. 406 (2007)

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Incompetence to be Executed

- *Ford v. Wainwright*, 477 U.S. 399
  -Defendants may not be executed if they are incompetent.
- *Panetti v. Quarterman*, 551 U.S. 930
  -Once a prisoner seeking a stay of execution has made "substantial threshold showing of insanity," the protection afforded by procedural due process included a "fair hearing" in accord with fundamental fairness.

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Incompetent to be Executed

Panetti v. Quarterman, 551 U.S. 930
- A "fair hearing" in accord with fundamental fairness at a minimum require:

"These basic requirements include an opportunity to submit "evidence and argument from the prisoner's counsel, including expert psychiatric evidence that may differ from the State's own psychiatric examination."

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Unanswered Questions

- **Can an incompetent Defendant proceed in collateral review without being restored to competence?**
- **Is the Defendant making a Knowing waiver of mitigation without a complete investigation?**

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